THE LAW OF THE CONSTITUTION.[1]

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The seventh edition of Professor Dicey's well-known volume presents, as its most notable feature, an entirely new chapter on the droit administratif. All the previous editions have contained a chapter with this heading, but the doctrines set forth have, within the last half-dozen years, aroused so much adverse criticism that Professor Dicey has reëxamined the whole subject anew and has restated his views in what now constitutes one of the most valuable chapters of a notable book.

The study of administrative law, as a branch of public law, has in recent years obtained increased recognition, and with this has come especial interest in the administrative law of France; for in that country the system has obtained its fullest development. There the evolution has been steady and although it has passed through several stages, is not yet completed. From the beginning of the nineteenth century France has had, for the determination of administrative litigation (the contentieux administratif, as it is termed) a system of special courts separate and distinct from the regular courts of the land. Other countries of continental Europe have more recently established similar courts, it is true, but in none of these is the jurisidiction of such courts as extensive as it is in the administrative courts of the French republic.

This comprehensive jurisdiction of the French administrative courts adds interest to the study of French administrative law, for as a result of it there exist more points of contact between the jurisdiction of those courts and that of the regular courts than is the case elsewhere, and hence it is that more opportunities are afforded for contrasting the decisions of the two sets of courts in France. Furthermore, French

[1] *The Law of the Constitution.* By Prof. Albert Venn Dicey. Seventh Edition. London, 1908.

administrative law includes many subjects which in other countries are within the jurisdiction of the regular courts. From all points of view France is undoubtedly the best field for the study of this branch of jurisprudence.

It has often been contended by French writers on administrative law that a comparison of the decisions of their highest administrative court (the Conseil d'État) with those of their highest regular court (the Cour de Cassation), will demonstrate that in analogous matters the rights of the individual have received more ample protection against official pressure in the former forum than in the latter. This contention seems to be well-founded; and, furthermore, the American student who gives the subject sufficient attention will not fail to be convinced that in many cases he would seek in vain from the regular courts of his own country the enforcement or even the recognition of those private rights against governmental authority which are daily vindicated in the administrative courts of France.

Although the present system of administrative courts was established by Napoleon I, as Professor Dicey points out, the origin of administrative jurisdiction must be looked for in the royal prerogative of the old régime. We may today look upon administrative jurisdiction as judicial both in its nature and in its procedure, but in its origin it was doubtless extra-judicial and its basis was the exercise of an arbitrary prerogative. Indeed, if the matter be historically considered, this may be said of the whole judicial function in England as well as in France, for as is well known the jurisdiction of the court of king's bench, the chancery, the exchequer, and the judicial committee of the privy council are all, in their inception, but manifestations of the exercise of royal prerogative through the agents or ministers of the crown. The powers of each of the above-mentioned tribunals may be looked upon as having emanated from the crown as truly as the same may be said of the parliament of Paris or of the Grand Conseil under the old régime. The only historical difference between the ordinary and the administrative courts is that the latter have retained their administrative organization and have resisted the tendency to transform themselves into regular judicial bodies.

This tendency on the part of an administrative body to be transformed into a judicial tribunal we may see clearly in the United States.

How often do we not see administrative boards or officials to whom are entrusted the decision of questions affecting rights of property required by the pressure of public opinion or even by law to adopt the procedure of a judicial body, and to take on all the paraphernalia of a regular court. In the course of time the decisions of such a body create a body of precedents for guidance in the settlement of causes, and when this stage is reached the process of transformation from an administrative board to an administrative court is completed and a body of administrative jurisprudence has been brought into being. The droit administratif of France is the result of just such an evolution. In its origin it was but the arbitrary action of the crown in determining through its own agents all questions in which the interests of the crown were involved; it has become a system of law administered in regularly constituted courts which are, however, still composed of administrative officials. It is worthy of note, moreover, that the system has transformed itself from one in which the interests of the crown and its officials were deemed paramount into a system which, in its actual operations, gives to the individual remedies against officialdom which in its absence he would not possess at all.

Administrative law is chiefly case-law; it has been made by those who administer it; it is therefore more flexible than code law and may be more readily adapted to new conditions. As one writer has said, "an administrative tribunal resembles a court in being able to formulate the rule of law best suited to a case, and resembles administration in being able to grant it." Professor Dicey is entitled to no small credit in having perceived, even more clearly perhaps than the French writers themselves, the tendency of administrative law to develop along this line. As one of their great writers on administrative law (Professor Hauriou) has expressed it, the French are indebted to him for having shown them how "la prérogative de l'administration doit logiquement avec le temps devenir la source d'un droit d'équité, et ainsi il nous a éclairé sur la veritable nature de notre droit administratif par rapport au droit commun."

Still it may be questioned whether Professor Dicey, in this his latest exposition, has not left some things to be desired. One may doubt, for example, whether in his account of the development of administrative law during the first half of the nineteenth century he quite

does justice to the institutions of that earlier period. Thus in describing the functions of the Conseil d'État under Napoleon I he states that "even when acting judicially" it was "more of a ministry than of a court," and he illustrates this with an analogy from English history.[2] No mention is made of the fact that by the decree organizing the Conseil d'État on the 5 Nivose of the year VIII (the very first year of the consulate) it was expressly provided that those councillors who had charge of any department of the public administration should have no vote in the Conseil when it passed on any case connected with that department. Nor is anything said of the establishment in 1806 of the comité du contentieux, or judicial committee, within the Council and of this body's duty to examine all administrative cases which came before the larger organization, and also to prepare the drafts of the decisions. We have the opinion of Laferrière that this committee was the real organ of higher administrative jurisdiction, and of M. de Cormenin that it rescued the administrative jurisdiction from the gulf of arbitrary government. The Napoleonic legislation thus draws a sharp distinction between the functions of the Conseil d'État as a court and its functions as an organ of administration; and this fact renders Professor Dicey's English illustration quite misleading.

Again, in dealing with the second period in the development of French administrative law (1830–1870) Professor Dicey mentions that Englishmen will "learn with surprise that during the whole of these forty years few if any legislative or parliamentary reforms touched the essential characteristics of the droit administratif as established by Napoleon."[3] Now the fact is that the droit administratif of the Napoleonic era and of the Restoration was a secret, bureaucratic system. In cases to which it applied there was no public hearing, and no oral arguments of counsel were permitted. These features caused marked

[2] Thus the state of things which existed in France at the beginning of the nineteenth century bore more likeness to what would be the condition of affairs in England if there were little or no distinction between the cabinet as part of the privy council and the judicial committee of the privy council, and if the cabinet, in its character of a judicial committee determined all questions arising between the government on the one side and private individuals on the other, and determined them with an admitted reference to considerations of public interest or of political expediency. Pp. 344–345.

[3] P. 347.

hostility to the whole system of administrative jurisdiction, and the government of Louis Philippe at the very outset of his reign made important reforms eliminating the objectional features in administrative procedure.[4] So important were these reforms that they greatly assisted the government in stemming the agitation for the abolition of the administrative courts and enabled it to secure a firm anchorage for the whole administrative system in the law of July 19, 1845. Laferrière indeed speaks of this law as one of the most important organic laws of the Conseil d'État, and in view of this change alone (and it was not the only change made during the period) it would seem hardly correct to say that the essential characteristics of Napoleon's system were almost untouched by legislative or parliamentary reforms during the period preceding 1870.

In Professor Dicey's earlier editions it was the arbitrary character of French administrative law which most impressed him. He seemed to feel that an administration acting as judge in its own causes and deciding matters in accordance (as he deemed) with the dictates of its own self-interest afforded an instructive contrast to "the rule of law" in England, and it was with the intention of defining more precisely the significance of this latter that the chapter on the droit administratif was given a place in his original volume. Deriving his impressions (as he frankly informs us) largely from the earlier writings of De Tocqueville, he failed to perceive the great change which the droit administratif had undergone since De Tocqueville wrote, and which rendered the latter's criticisms wholly inapplicable to the system in its later development. Droit administratif as originally conceived by Professor Dicey, was a system of official privilege, a scheme or device whereby the official was protected against the consequences of his own wrongful or negligent acts. His chapter as now recast obviously endeavors to do full justice to the equitable aspects of the contemporary administrative law in the French republic; but certain vestiges of his original misconception still remain, and these detract somewhat from his otherwise excellent résumé of the subject. He tells us very properly, for example, that the droit administratif is "case law," or "judge-made law." "The precepts thereof are not to

[4] The Ordinances of February 2 and March 12, 1831.

be found in any code; they are based upon precedent."[5] But if this be accurate, is it fair to charge against system of droit administratif the special privileges and exemptions which are enjoyed by officials in virtue of statutory enactments such as Art. 114 of the Penal Code, and Art. 75 of the Constitution of the Year VIII?[6] This point is all the more worth noting, for Professor Dicey, in comparing the French and English systems of law contends that the public authorities protection act of 1893 and the "lot of acts extending from 1601 to 1900" should not be cited as examples of the existence of anything like administrative law in England although they definitely afford or have afforded to English public officials protection against suits at law.[7] If the existence of these English enactments be not material to a determination of the question whether or not administrative law has any place in English jurisprudence, why should the French enactments be considered as part of administrative law beyond the Channel, or how is it possible for constitutions and statutes to form part of a system of "case law or judge-made law?" If Professor Dicey would be just he must apply the same criterion of administrative law to both countries. If the administrative law of a country is only that law which is applied by the administrative courts, then it may be entirely proper to say that administrative law exists in France but not in England, for France possesses such courts and England does not. But if this be the test (namely the existence of a separate set of courts) then the French enactments to which Professor Dicey refers are no part of French administrative law, for they neither affect the jurisdiction of these courts nor would questions arising under them go to the administrative courts for determination.

On the other hand, if we take administrative law to be the whole body of jurisprudence governing the relations between officials and individuals, the enactments which protect the official from suits where private individuals are not so protected do certainly form part of it, and the English statutes which Professor Dicey cites do form a part, and a very material part, of the administrative law of England. The matter in fact has a practical as well as an academic importance. It is not a question concerning itself merely with the comparative value

[5] P. 369. [6] Pp. 342 ff. [7] P. 382, Note 2.

of two definitions of the term administrative law; it is rather a question as to whether there exists such a fundamental dissimilarity between English and French methods that, by contrasting the two, one may render more impressive to the student the meaning of the "rule of law" in England. Professor Dicey insists on the idea that such a sharp contrast does exist and his desire to emphasize the differences between the two systems has perhaps led him at times to minimize or even to ignore their points of resemblance.

It is beyond question, for example, that each country has sought to protect its public officials from vexatious suits brought against them on account of the way in which they may have performed their public duties. The French at the outset employed to this end the device of requiring the consent of the council before a suit might be brought against a public official; now they substitute for the personal responsibility of the official (in certain cases) the liability of the state itself or of his official superior. The English device (as adopted in the public authorities protection act 1893) is to subject all claims of private individuals against officials to a very short statutory period of limitation, and to impose a heavy pecuniary penalty upon every unsuccessful plaintiff in such actions. The devices are not identical; their purpose is. But of this resemblance Professor Dicey takes no account.

In his earlier editions, again, Professor Dicey set forth the entirely inaccurate proposition that the system of administrative law in France had for one of its especial aims the protection of policemen from the consequences of their illegal acts, when as a matter of fact actions against policemen for illegal arrests are always brought in the regular courts and the administrative courts have not had the slightest relation to such actions. In the present edition these inaccuracies of statement have disappeared; but the ubiquitous policeman will not down, and, like the head of King Charles in a famous memoir, persists in reappearing at inopportune moments. In his new rôle the French gendarme is no longer the ward of the administrative courts but one of the officials sheltered by the ægis of the wicked Garantie Constitutionelle, the famous Article 75 of the Constitution of the Year VIII.[8]

[8] Les agents du Gouvernement, autres que les ministres, ne peuvent être poursuivis pour des faits relatifs à leurs fonctions, qu'en vertu d'une décision du conseil d'état; en ce cas la poursuite a lieu devant les tribunaux ordinaires."

To this Professor Dicey frequently reverts.[9] Now the burden of the sins which this oft-quoted article (peace to its ashes; it was repealed, as Professor Dicey knows, no less than thirty-eight years ago) may properly be called upon to bear is indeed heavy enough without attempting to add thereto anything which does not belong to it; and the fact of the matter is that policemen (sergents de ville and gendarmes) were not among those "agents du gouvernement" who could take refuge under the protection afforded by this article, for the words "les agents du gouvernement" have never been construed to include policemen. So long as this article remained in force suits against policemen were brought in the ordinary courts and no permission from the Conseil d'État was necessary to bring them there.

Professor Dicey draws a most interesting parallel between that conception of the royal prerogative which was the basis of the droit administratif under the old régime in France and that theory of prerogative which the crown lawyers of the seventeenth century attempted to impose upon the English people. The parallel is entirely just, for there can be no doubt that both countries were fundamentally alike in their conception of the crown as the source of all justice. But Professor Dicey's further attempt to establish an analogy between the Article 75 already referred to and Bacon's writ, "De non procedendo, Rege inconsulto" would seem to be infelicitous. Article 75 applied only to suits against officials and was a device for preventing such suits without administrative permission. The writ, "De non procedendo, Rege inconsulto," on the other hand, was of far wider scope. It was, as Bacon assured the king "a means provided by the ancient law of England to bring any case that may concern Your Majesty in profit or power from the ordinary Benches to be tried and judged before the chancellor of England by the ordinary and legal part of this power." This would include any suit whatever in which the crown might happen to feel that its interests were involved, and would provide for the trial of all such causes before a special minister of the king (the chancellor), and not before the regular courts as would be the case when permissions were had under the terms of Article 75. The effect of Bacon's writ therefore seems much more like that of the "evocation" of the old

[9] See, for examples, pp. 343, 354–5 and 383, note 2.

régime whereby causes were removed from the ordinary courts for trial before the royal council.

In conclusion it should be stated that Professor Dicey's new chapter on droit administratif now constitutes a very valuable feature of his *Law of the Constitution,* marking a distinct advance in this respect over earlier editions, and that the comparison which the author draws between the rule of law in England and the droit administratif in France, while at times somewhat strained, is on the whole instructive; although Prof. Dicey's thesis that the "rule of law" is the sam in England for contests between officials and individuals as for teose between private citizens would seem to be open to grave objecthons. By whatever name one may call it, England undoubtedly possiesses administrative law, in the sense of a special set of legal rules governing the relations between the administration and its officials and the private citizen and the contrast between the rule of law as between private individuals and the rule of law as between the government and the individual is one which may be drawn instructively in England, as indeed in any country. This is particularly true of the United States, for it must not be forgotten that the "prerogative of the administration" may exist and has actually existed in republics as in monarchies, as France during her great revolution found to her cost, and as we have often had occasion to learn in this country. In the study of the development of French administrative law the student of American institutions may find both instruction for the present and guidance for the future. In such study much assistance may be derived from a careful examination of Professor Dicey's new chapter. But to those who desire to inform themselves with comprehensiveness and accuracy on this subject this chapter should serve only as an introduction to the works of Aucoc, Laferrière, Hauriou, Bérthelèmy, and the other great writers on the modern administrative law of France.